United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7213

To be argued by
DORON GOPSTEIN 75-7213

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUIS FUENTES,

Plaintiff-Appellant,

-against-

ADOLPH ROHER, RICHARD LEE PRICE, JEROME GOODMAN, MARTIN RUBIN, SAUL MILDWORN, DONALD S. BROWN, LYLE BROWN,

Defendants-Appellees

GEORGINA HOGGARD, HENRY RAMOS, CARMEN BARRETO, JANICE WONG, CAROLYN KOZLOWSKY,

Defendants-Appellants.

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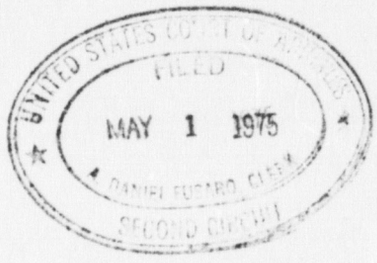
P/B

DEFENDANT-APPELLEES' BRIEF



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PRELIMINARY STATEMENT

This is an appeal by plaintiff from an order and judgment of the United States District Court for the Southern District of New York (Stewart, J.) entered March 18, 1975 denying plaintiff's motion for a preliminary injunction and dismissing his complaint. Plaintiff sought to enjoin administrative hearings which were to take place upon charges filed against him.

Plaintiff also appeals from a second order of the District Court, dated April 3, 19 5, and granted upon plaintiff's own motion for reconsideration. This order directed the defendants to take certain actions which would have assured plaintiff a speedy administrative hearings. Certain of the defendants join plaintiff in appealing the April 3, 1975 order.

FACTS

Statement of the Case

The litigation history of the proceedings below, while distinct from events surrounding the underlying events, can most accurately be related in conjunction with the many administrative and judicial proceedings (in other courts) related to the same events which took place simultaneously and sometimes affected the course of these proceedings.

Plaintiff Luis Fuentes commenced this action by filing a complaint dated December 21, 1973 seeking to enjoin his suspension and possible dismissal as Community Superintendent by the defendant members of Community School Board Number One, based on charges which had been preferred against him by the Board on October 16, 1973.

Prior to the filing of his complaint, plaintiff's suspension had been enjoined by a temporary restraining order signed by the District Court (Stewart, J.) on October 19, 1973 in a then-pending voting rights action. In that action, minority voters in Community School District One sought to set aside the result of the District 1 Community School Board elections of May, 1973 on the ground that they had been conducted in a discriminatory fashion. 1/

1/ Coalition for Education in District One v. Board of Elections, City of New York, 510 F. Supp. 42 (S.D.N.Y. 1974) aff'd, 495 F. 2d 1090 (2nd Cir. 1974).

The May, 1973 election was set aside by the Court and a new school board was elected in a special election held in May, 1974, pursuant to the Court's order. Six members of the nine-person school board were reelected and took office on July 1, 1975. 2/

On August 8, 1974 the Community School Board passed a resolution (D. 46; Appendix "I") 3/ by majority vote at a public meeting preferring detailed and serious charges of misconduct against Mr. Fuentes which had been filed with Board (D. 46; Appendix "J"). The Board provided that Mr. Fuentes was to be suspended with full pay ($38,500 a year) pending the hearing and determination of

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2/ Defendants Roher, Kozlowsky, Price, Goodman, Haggard and Ramos were reelected. Defendants Mildworn, Donald S. Brown and Lyle Brown either did not run or were defeated for reelection. Martin Rubin, Janice Wong and Carmen Barreto were elected to the Board for the first time at the May, 1974 special election and were added as defendants in plaintiff's supplemental complaint.

3/ "D" refers to the Document Number as it appears in the Index to the Record on Appeal filed by plaintiff-appellant. In this instance, the resolution as annexed as part of attachments and exhibits to Document Number 46, Gopstein affidavit, August 26, 1975. The Appendix citation refers to the designation of that document in the Appendix which defendants-appellants submit herewith.

the charges before a trial examiner. The Board further provided that a full evidentiary hearing -- on notice and with right to counsel, to introduce witnesses and to cross-examine -- commence expeditiously on August 28, 1974 before a hearing examiner to be named by the Board.

The Board named the Deputy Superintendent to be the acting Superintendent and directed that Mr. Fuentes stay away from the District offices and school buildings pending a determination of the charges. Mr. Fuentes did not accept the legality of the Board's action and, without recurring any judicial or administrative stay of his suspension, proceeded to return to work the next day, Friday, August 9, 1974. (Opinion, 5-6). 4/

On Monday, August 12, 1974, Justice Bernard Nadel of the New State Supreme Court (New York County) signed a restraining order enjoining Mr. Fuentes from, inter alia,

> "entering upon the premises of any building or facility under the direction and control of Community School District #1 or remaining thereon except with the permission of the Community School Board or a duly authorized agent thereof."

and from

4/ The District Court's main opinion of March 18, 1975 will be cited as "Opinion" followed by the appropriate page references. The Opinion is included as part of plaintiff-appellant's Appendix. References to other opinions of the District Court will be described appropriately.

> "preventing, hindering or performing in any way with the administration of the schools, staff or operations of Community School District #1."

Roher v. Fuentes, Sup. Ct., N.Y. City., Index No. 41673/74 (D. 46; Appendix "C") extended a number of times by various State Supreme Court Justices. On October 11, 1975, after hearings, a preliminary injunction was entered against Mr. Fuentes, signed by Justice Samuel R. Rosenberg, containing the same terms as the restraining order (Appendix, "D" and "E"). On December 24, 1974, the Appellate Division, First Department, unanimously rejected Mr Fuentes' appeal and affirmed the preliminary injunction (Roher v. Fuentes, 46 AD 2d 1016; cited also at N.Y.L.J., Dec. 24, 1974, p. 2, col. 3 (Appendix, "E").

After the restraining order was entered in State Supreme Court on August 12, 1974, Mr. Fuentes did not attempt to vacate it but instead sought to remove the action to federal court. (Roher v. Fuentes, S.D.N.Y., 74 Civ. 3524)

Following two days of hearings in the District Court, Judge Richard Owen granted plaintiff Roher's motion to remand the proceedings back to the state courts. Mr. Fuentes had urged that the state court restraining order be vacated. Judge Owen refused and specifically ruled that the restraining order entered against Mr. Fuentes by the State courts was to continue in full force and effect as an order of the District Court. (D. 46) (D. 27, Transcript of August 19 hearing)

At the conclusion of the same hearings, Mr. Fuentes asked the court to sign a temporary restraining order as part of the Fuentes v. Roher action pending before Judge Stewart (who was then away on vacation). The order would have restored Mr. Fuentes to his position as superintendent. Judge Owen denied the motion and made Mr. Fuentes' motion for a restraining order and a preliminary injunction (to enjoin the Board from suspending or dismissing him based on the August 8, 1974 charges) returnable August 26, 1974 before Judge Stewart. Judge Owen also struck out a paragraph proposed by Mr. Fuentes which would have stated, inter alia, that Mr. Fuentes would suffer irreparable harm unless restored to his position. (Appendix, "A").

With the injunctive proceedings having been remanded by State court on August 19, 1974 Mr. Roher's motion for a preliminary injunction was renoticed by the State court to be heard August 26, 1974. On August 26, Mr. Roher's attorneys were prepared to proceed on their motion in State court. Counsel for Mr. Fuentes requested on adjournment. Judge Morris Spector granted the adjournment (to September 9) but specifically extended the restraining order which had been signed by Justice Nadel and continued by Judge Owen. (D. 41)

While Mr. Fuentes was unsuccessfully challenging his suspension in various courts, his supporters on the School Board (defendants Haggard, Ramos, Barreto and Wong) attempted to challenge the action of the Board through administrative appeals which are available (from community school board actions) to the Chancellor of the New York City school system and, from there, to the Board of Education of the City of New York.

Both the Chancellor (on August 19, 1974) (D. 46; Appendix, "F") and the City Board of Education (on September 4, 1974) (D. 45; Appendix "G") rejected the appeals and found that the procedures followed at the August 8, 1974 meeting in preferring charges and in suspending Mr. Fuentes were proper and lawful and consistent with applicable state statutory and administrative requirements. 5/

After being enjoined by Justice Nadel, Judge Owen, and Justice Spector (on August 12, 19 and 26, respectively) from violating the terms of his suspension, and after having had this request for a temporary order restraining his suspension denied by Judge Owen on August 19, and after having Chancellor Anker uphold on August 19 validity of the procedures followed in his suspension. Mr. Fuentes refused to appear at

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5/ The City Board's decision was appealed further and upheld by the State Commission of Education, Appeal of Henry Ramos 14 Ed. Dept. Rep. __, (Decision No. 8995, April 18, 1975) (Appendix, "H").

the first session of his administrative disciplinary hearings before the trial examiner on August 28, 1974.

Mr. Fuentes' counsel advised the trial examiner that "pending litigation in both federal and state courts related to the matter here makes such a meeting inadvisable at the present time." (D. 40; Appendix "L"). A stay of these hearings had not been granted by any court or administrative agency. The only "pending" litigation involved actions which had specifically upheld the validity of the suspension or refused to relieve Mr. Fuentes of the suspension. As the District Court found, this was to be the first of many actions by Mr. Fuentes which had the effect of avoiding, frustrating and delaying his administrative hearings. (Opinion, 7-9, 23, 23 n.9; D. 40, 49)

While refusing to appear at his administrative hearing, Mr. Fuentes updated his December 1973 complaint in the present action by filing a supplemental complaint, challenging the August 8, 1974 actions of the Board, pursued his motion and to enjoin his suspension (which Judge Owen had denied when first presented to him August 19).

On September 4, 1974, after oral argument and extensive briefs and affidavits had been submitted, Judge Stewart denied plaintiff's motion, writing, in part:

> "Mr. Fuentes presently is charged with acts that affect his reputation, but there will be no increased damage to his reputation pending further hearings, and it is the final outcome in this controversy that will either harm or vindicate his reputation. Plaintiff has been suspended with pay and a full due process hearing on the charges is scheduled." (emphasis added). (D. 12; included in plaintiff-appellants Appendix).

Because of Mr. Fuentes' failure to appear at his administrative hearing, the trial examiner (Marcy Cowan) rescheduled the hearings to September 24, 1974.

On September 27, 1974, Mr. Fuentes filed the motion for a preliminary injunction (brought on by order to show cause), which is the subject of this appeal, seeking to enjoin the defendant School Board members "from proceeding with and compelling plaintiff to submit to an administrative proceeding ordered by defendants pursuant to this resolution dated August 8, 1974."

At the September 24 administrative meeting, the Hearing Examiner indicated that he would hold hearings twice a week in the late afternoon, for two hours each session since he felt they could not inconvenience anyone. 6/

In seeking a preliminary injunction from the District Court, however, Mr. Fuentes complained that the administrative hearings, which he had already avoided once, would only be held twice a week and that "given this schedule, a resolution of these charges will take months." D, 18, Teitelbaum affidavit, September 27, 1974).

The complaint was reported at a conference with Judge Stewart on September 27, at no time during the administrative hearing on September 24 had Mr. Fuentes' attorneys object to the proposed hearing schedule or sought a more expeditious schedule.

The Hearing Examiner, Marcy Cowan, wrote a letter on October 3, to Mr. Fuentes' attorneys stating that he was "startled" by their statements in Court in support of their motion for a preliminary injunction. He wrote:

6/ See Transcript, In the Matter of Luis Fuentes, September 24, 1974, annexed as Exhibit 7 to D. 40, Mr. Aronstein's affidavit, Oct. 4, 1974.

> "The position you took was most unexpected and so different from the transcript of the [September 24] conference would lead one to anticipate.
>
> No objection was raised by you to hearings from 4:00 P.M. to 6:00 P.M. No request was made by you for longer or more frequent sessions." (D. 49; Appendix, "N")

He made it clear that he was ready to proceed with "a normal full court day session as often as the parties desire in order to expedite things ... Hopefully the attorneys and I will agree on a schedule of days and hours to permit moving with dispatch." 7/

Not only did the administrative hearings not proceed on "a normal full court day session" as proposed by the Hearing Examiner, they ground to a complete halt because Mr. Fuentes once again announced his intention not to participate in any way in the administrative proceeding.

7/ Many weeks later, with the Hearing Examiner still ready to hold regular and frequent hearings, the wheel had come full circle. As Judge Stewart found: "Fuentes' present attorney in the administrative proceedings requested that hearings be limited to two evenings per week between January 6 and January 30 [1975] due to another commitment. Ironically, Fuentes' prior attorneys had urged last fall that twice weekly hearings before Cowan should take place more frequently." (Opinion, p. 23, n. 24)

Mr. Fuentes' counsel wrote to the Hearing Examiner on September 30, 1975 that because of the preliminary injunction motion which Mr. Fuentes had filed on September 27

> "petitioner has been advised by counsel to take no further steps respecting the administrative proceeding until the determination of the issue before the Federal Court is had.
>
> Accordingly, until a decision is rendered by the Court, petitioner will appear at no further meetings."
> (D. 40; Appendix, "M")

Plaintiff thus managed to point incorrectly to an alleged lack of expedition by the Hearing Examiner as one element in support of his motion for a preliminary injunction, and then proceeded to cite the very motion which he had filed as a reason for refusing to proceed in any way with the administrative hearings. 8/

8/ This posture was evident in other areas. At the September 24 conference with the Trial Examiner and earlier, Mr. Fuentes' attorney insisted on pre-hearing discovery. In response, the Trial Examiner suggested that he serve a demand for a bill of particulars by October 1 with the School Board's attorney in the administrative hearing (Richard Aronstein) to reply by October 8. With the hearing to commence on October 16, as Mr. Fuentes' attorney requested (the School Board's attorney wanted it to resume sooner) (D. 40). Plaintiff never served his demand for a bill of particulars since on September 30 he decided not to appear or serve any papers in the hearings, citing as the reason his filing of his latest motion in the District Court. At a conference before the District Court on October 7, defendants' counsel suggested to Mr.

Hearings on plaintiff's preliminary injunction motion had commenced on October 1. On October 11, the District Court signed a temporary restraining order enjoining the continuation of the administrative hearing "pending the holding of an evidentiary hearing before this court scheduled for October 21." The order had the effect of staying the administrative hearing which had been scheduled for October 16.

Defendants filed a notice of appeal from the order and moved for reconsideration before the District Court(D. 34, Transcript of October 18, 1974). The District Court concluded that the evidentiary hearings on the preliminary injunction should commence expeditiously but the administrative hearing should not be stayed. Opinion 9; D. 34; D. 36, Transcript of October 21, 1974 hearing). The Court thus modified its October 11 order on October 21. The Court rescinded the stay contained in its October 11 order, and provided that the evidentiary hearing ("on the questions of bias on the part of defendants and the futility of the administrative process") commence on October 25 and that the administrative hearing before Hearing Examiner Marcy Cowan continue in the meanwhile. (Appendix, "B")

8/ continued

Fuentes' counsel that by refusing to continue with the administrative proceedings he would not be able to submit his bill of particulars on time. Mr. Fuentes' counsel responded that he was not obliged to serve a demand for a bill of particulars. On December 3, after additional delays, Mr. Fuentes (now represented by a new attorney in the administrative hearing) complained that the Hearing Examiner would not permit him to file a bill of particulars (D. 38, Katz affidavit).

In accordance with this order, evidentiary hearings before Judge Stewart commenced on October 25 and continued on October 25, 29, 30, November 4,6, 7 and 12. Judge Stewart heard extensive testimony from, among others defendant school board members Adolph Roher (Tr. 96-327) [9/] and Richard Lee Price (Tr. 328-500), [10/] Hearing Examiner Marcy Cowan (plaintiff attempted to demonstrate that Mr. Cowan too was biased against him (Tr. 22-87)) and an ex-member of the Board, defendant Donald Brown, all whom were subjected to very extensive and hostile examination by plaintiff's attorneys. Judge Stewart frequently asked questions himself of the witnesses.

9/ "Tr." refers to the 744-page transcript of the evidentiary hearing on plaintiff's preliminary injury motion, conducted between October 25 and November 12, 1974.

10/ Mr. Price and Mr. Roher were the only two defendant members of the School Board to testify. Plaintiff's counsel introduced offers of proof regarding Board members whose testimony, he claimed, would be similar to that of Kozlowsky, Goodman and Rubin, defendants Price and Roher. The other four members of the Board were not called. Of the defendant ex-Board members, Donald Brown was called. Former Board members Mildworn and Brown are defendants-appellees herein.

On November 12, plaintiff concluded his case. Defendants then moved for an order denying plaintiff's motion for a preliminary injunction. (Tr. 713) Judge Stewart orally granted that motion. 11/

The District Court found that Trial Examiner Marcy Cowan "indicated an ability to act on this matter impartially (Tr. 735) and that Cowan "will deal with this objectively and impartially" (Tr. 737). Judge Stewart further found that plaintiff had failed to prove that the defendant members of the Board would be biased in passing on the record developed by Trial Examiner Cowan -- "I can't say on the basis of the record that I have seen that the Board is going to ignore the record that Mr. Cowan is going to develop" (Tr. 736-737) or that "they will not act to the best of their ability in an objective way." (Tr. 737).

11/ Since defendants' motion was granted at the conclusion of plaintiff's case, it was of course not necessary for defendants' to present their witnesses. Were this Court to reverse Judge Stewart's denial of the preliminary injunction, it would appear that the matter would have to be remanded to the District Court for the continuation of the hearings on the preliminary injunctions to permit defendants to present their evidence.

Judge Stewart reasserted his earlier findings (stated in his September 9, 1974 Opinion) that Mr. Fuentes would not suffer irreparable harm by proceeding with the administrative hearing and stated that "we should go through the hearings that have been set up pursuant to the contract that Mr. Fuentes entered into" (Tr. 737).

Plaintiff moved for reargument. His motion was granted and oral argument was heard on December 2.

Towards the end of November, plaintiff Fuentes obtained new counsel in the administrative hearings(Sanford Katz). At a hearing on December 3, plaintiff's new counsel requested an adjournment into January 1975 (D. 38). This was denied but the hearings were subsequently adjourned into January at Mr. Fuentes' request because of an illness in his family. In January Mr. Fuentes' counsel citing the demands of other litigation, successfully requested that the hearings be held on an abbreviated schedule, twice a week in the evenings (D. 38; Opinion, 23 n. 9). Early in February, Marcy Cowan was forced to withdraw as the Hearing Examiner in the administrative hearings. On being informed of this on February 6, Mr. Fuentes' counsel promptly wrote to the School Board's counsel to inform him that Mr. Fuentes wanted the hearings to resume "without any further delay." (D. 38).

On March 18, the District Court issued its findings and decision, from which plaintiff appeals. The Court reaffirmed its denial of November 12 of plaintiff's motion for a preliminary injunction. In addition, the District Court granted defendant's motion to dismiss the complaint, filed on October 10, 1974 (D. 22). The District Court also denied plaintiff's pendent state claims and dismissed defendant Richard Price's counter-claims.

Judge Stewart found that (1), the members of the school board whom he heard testify and whom he found to be credible witnesses were not biased and would objectively consider the record of the administrative hearing and the findings of the hearing examiner; (2) the Hearing Examiner was not in any was biased against Mr. Fuentes; (3) Mr. Fuentes would not suffer irreparable injury while suspended with full pay and pending a determination of the charges following a full evidentiary hearing; (4) Adequate state administrative appeal remedies were available from a decision of the community school board and would have to be exhausted in the event the charges were upheld by the school board. These points are discussed more fully below.

Following the District Court's March 18 decision, Mr. Fuentes moved orally for a reconsideration based on the fact that a new Hearing Examiner had not been named. In response to this motion and to insure that Mr. Fuentes receive a speedy hearing, Judge Stewart on April 3, 1975 issued an additional Memorandum and Order (D. 59; included in plaintiff-appellant's Appendix) directing the defendant members of

the Community School Board to either select a new Trial Examiner by April 7 or,by April 8, to ask Irving Anker, the Chancellor of the New York City School system, to appoint a Hearing Examiner.

Both plaintiff Fuentes and five defendant members of the school board (Hazgard, Wong, Barreto, Ramos and Kozlowsky) [12/] filed notices of appeal from the April 3 order. On April 7, the defendants-appellants Board members moved for a stay pending appeal. On April 8, this Court denied the stay. Justice Garfein stated that the defendant-appellant Board members would not suffer any irreparable injury. They were to go ahead and select a Hearing Examiner, as provided in Judge Stewart's Order, and they could of course then challenge that ruling on appeal.

12/ Mr. Ramos is named as a defendant although he is apparently no longer a member of the school board. On April 2, 1975, the chairman of the school board, defendant Adolph Roher, notified Chancellor Anker that Mr. Ramos had missed three consecutive public meetings of the school board February 26, March 10 and March 17, 1975) and had also been absent at a subsequent meeting of the Board (March 31, 1975) at which he was to have an opportunity to explain his absence to the other members of the Board and that he had thus vacated his office pursuant to the provisions of New York Educ. Law, §2590-c. 34 (a) and of the school board's by-laws.

Statutory and Contractual Provisions Governing Employment and Dismissal of Plaintiff Fuentes

By state statute, each community school board is empowered to employ a community superintendent by contract for a period of two to four years. The community superintendent is subject "to removal for cause." N.Y. Educ. Law §2590-e(1)(a). No hearing is provided for. Tenured teachers and supervisors are afforded additional protections by the statute, which provides that they are removable for cause but only after a full evidentiary hearing (e.g., N.Y. Educ. Law, §§2590-j(7), 2573 subdivs. 6 and 7).

Plaintiff Fuentes' three year contract with Community School Board No. 1 (August 1, 1972 to July 30, 1975) (D. 1; Appendix "K")[13/] provides him additional protections far exceeding those provided community superintendents under state law. The contract provides that dismissal shall be by a two-thirds vote[14/] and that:

13/ There is doubt about whether the school board ever ratified the contract but defendants-appellants have not raised this below and will assume, arguendo, that the contract was properly executed for the purposes of this appeal.

14/ This contradicts Article V, Section 4 of the School Board's own By-Laws, which provide that the termination shall take place "upon an affirmative vote of the majority of the whole number of the members of the Board."

> "Cause shall consist only of those matters ennunciated in subdivision 7(b) of Section 2590-(j) of the Education Law. School board, except as they shall be inconsistent herewith, shall be subject to the procedural rules of subdivision 7 of Section 2590-(j) of the Education Law, provided that school board shall have powers and duties as are therein prescribed for the Community Superintendent."

Section 2590-j(7) provides the procedures to be followed by a community superintendent and a community school board in preferring and prosecuting charges against tenured teachers or supervisors employed by community school boards. Since a superintendent against whom charges are brought obviously could not perform the functions prescribed in that section for a superintendent who is bringing charges against others, plaintiff Fuentes' contract provides that the school board, in bringing charges against Mr. Fuentes, perform those functions which the superintendent would normally perform in bringing charges against tenured teachers and principals.

Thus, under the contract which plaintiff negotiated with the then school board is the entity empowered, inter alia, (1) to initiate the charges (§2590-j.7(b), (2)) to appoint a trial examiner to be "selected from a panel of competent persons maintained by the chancellor" (§2590-j.7(f), and (3) to act upon the report of the trial examiner, after a hearing, by rejecting, confirming or modifying the report of the trial examiner by a majority of all the members (§2590-j.7(f).

Judge Stewart found that the school board duly complied with its responsibilities under the contract (Opinion, 12).

Plaintiff, however, repeatedly claims that it is unlawful for the school board to perform precisely those functions which it is required to perform by his contract. He attacks the "multiplicity" of functions or individual functions which the Board is empowered to perform. Thus, for example, plaintiff's counsel complained about how "unfair it was for the School Board, the prosecutor, in effect in these proceedings, to alone be able to select the new Hearing Officer" and urged that Mr. Fuentes be given a role in that selection. (D.38) Yet Mr. Fuentes' contract (incorporating the statute) provides specifically that the school board initiate the charges and shall name the hearing examiner.

The Charges Against Plaintiff

The 41 charges filed against Mr. Fuentes by the school board on August 8, 1974 (Appendix, "J") relate to serious and detailed allegations of misconduct concerning his educational and administrative responsibilities as superintendent under state law, the school board's by laws and his contract. The seriousness of the charges are apparent in light of the statutory relationship between the elected community school board and its appointed superintendent.

The New York Education Law provides that:

> "each community superintendent shall comply with all applicable provisions of law, bylaws, rules or regulations, directives or agreements of...his community board and with the educational and operational policies established by...his community board." (§2590-F.2).

This is reasserted with even greater emphasis in paragraph 3(a) of plaintiff Fuentes' contract which provides that his responsibilities include those enumerated in the statutory provision cited immediately above

> "...and such other duties as the School Board shall hereafter assign, subject in all the foregoing instances to the policies, procedures and specific instructions of the School Board..."

Among the broad powers and duties of the school board under state law are the appointment and dismissal of all employees, (N.Y. Educ. Law, §2590-e.2), the determination and submission of the budget (§2590-i.(2)(7)(8) and (14)), the determination of matters relating to the instruction of students (§2590-e.3), the operation of school lunch programs (§2590-e.7), and, generally, the management and operation of the schools and other facilities under its jurisdiction (§2590-e.4).

The charges against Mr. Fuentes allege misconduct in many of his most basic responsibilities as the superintendent. Judge Stewart summarized the charges (Opinion ,5) and found that "examples of the apparently more serious charges against Fuentes include the following:

> (a) that Fuentes on September 25, 1973 falsely stated and reported to the board that he had conducted a complete investigation of alleged improprieties occurring on school property involving hiring of personnel for a proposed bilingual program; (b) that in August, 1973, Fuentes threatened violence and danger to the persons of members of the Board in the future in the event that they did not make 'wise' decisions; (c) that Fuentes failed to conduct an investigation in September of 1973 of charges of anti-Semitism at Junior High School 22,

as the board had directed;[15] (d) that Fuentes conspired with and aided certain individuals in July and August of 1973 in their efforts to impede, disrupt, and interfere with the conduct of Public School Board meetings; and (e) that in May, 1974, Fuentes illegally and improperly permitted a successful bidder for the school lunch program contract to withdraw its bid in favor of granting the contract to a higher bidder."
(Opinion, 5, m. 5)

While this may not be the proper forum to expound on the details of the New York Education Law, an examination of such provisions, as well as additional provisions contained in the school board's bylaws and in its contract with Mr. Fuentes, makes it abundantly clear that the charges are intimately, and specifically, related to the most fundamental duties and responsibilities of the community superintendent.[16]

15/ In February, 1974 a complaint was filed with the New York State Division of Human Rights by a number of assistant principals in Junior High School 22 (in District 1) against Mr. Fuentes and Allen Boone, principal at Junior High School 22, claiming certain discriminatory practices including, inter alia, a failure by Mr. Fuentes to conduct a personal investigation of certain alleged anti-Semitic activity as ordered by the school board on October 10, 1973, Levine v. Fuentes (New York State Division of Human Rights, Case No. GCR-32628-74). In an order dated June 19, 1974, the Division found that there was probable cause to believe respondents had engaged in the practices complained of and set the matter down for public hearings. The hearings have continued intermittently since then.

16/ This was discussed at somewhat greater length in Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction (D. 45), pp. 10-13, and, in a somewhat different context in defendant Roher's affidavit of August 30, 1974 (D. 42).

Events Surrounding Judge Stewart's
April 3, 1975 Order

As noted above, Judge Stewart's order of April 3, 1975, resulted from what was deemed to be plaintiff Fuentes' oral motion for reconsideration at a conference held March 19, 1975, before Judge Stewart at the request of plaintiff's counsel. Additional conferences were held on March 26 and April 7.[17/]

What became apparent at these conferences was that defendant Board member Kozlowsky, who had originally voted on August 8, 1974, to prefer charges against Mr. Fuentes, had apparently had a change of heart (despite the "offer of proof" made by Mr. Fuentes' counsel on November 12, 1974 that were Mrs. Kozlowsky to testify, it would be clear that "the removal of Luis Fuentes was and has been one, if not the principal aim of her candidacy and membership to the board. Her support for the removal of Luis Fuentes is politically motivated." (Tr. 704) Instead of citing Mrs. Kozlowsky's presumably unalterable bias and prejudgment against him, as he had throughout the hearings in arguing that the results of the hearings

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17/ During these meetings defendants-appellees' counsel on a number of occassions expressed his uncertainty about the nature of these proceedings in light of the dismissal of the action by the District Court in its March 18 opinion and the failure of plaintiff to file any papers noticing or defining the motion.

were predetermined, plaintiff now began to cite Mrs. Kozlowsky's change of heart and her apparent support for plaintiff in seeking relief from the Court.

What was also established at these hearings was that despite this change of view, the charges voted against plaintiff on August 8, 1974 continued in full force and had not been rescinded by any subsequent action of the Board. In light of this, the most immediate problem was to provide a new hearing examiner so that the hearings could continue. In moving orally for reconsideration on March 19, 1975, plaintiff's counsel asked Judge Stewart, inter alia, to direct that a hearing examiner be named so that the administrative hearings could be resumed.

Judge Stewart in large part granted plaintiff's motion with the issuance of his April 3 Order. The Court was informed of the Chancellor's involvement with this problem and his willingness to appoint a hearing examiner if requested by a majority of the Board (Transcript, April 2, 1975, hearing). In light of the continuing validity of the charges against Mr. Fuentes and his right to a hearing, the District Court ordered the defendant members of the Board to select a hearing examiner by April 7 or, if they failed to do so for other reasons, to ask the Chancellor to appoint an examiner by April 11. This Court refused to stay this order. Thus, although we are not entirely clear about the jurisdictional

bases of these subsequent proceedings, it is clear that as of April 3, 1975, the District Court had provided plaintiff Fuentes with a remedy which would have assured him of the speedy administrative hearing he was seeking.

The events beyond April 3, 1974 are, of course, not part of the record before this Court. Although it is not entirely clear, it appears that plaintiff-appellant's Brief, dated April 18, 1975, might be referring to such events when it states, at p. 28, that "To date there is no hearing examiner ..." If that is the case, defendants-appellees wish to advise the Court that they are prepared to demonstrate that subsequent to the issuance of the April 3 Order, and the denial by this Court of a stay of that order on April 8, defendants-appellants failed to either name a hearing examiner or ask the Chancellor to appoint a hearing examiner, as provided in the April 3 Order, and that a hearing examiner has not been named solely as a result of this failure to act.

Summary

The tangled and sometimes bizarre history of this proceeding and of the underlying controversy occassionally appears to defy description.

Some things, however, have been clear from the beginning. When Mr. Fuentes first sought to avoid the administrative hearings in August, 1974, his counsel argued he should not be forced to go through a "futile" process. Judge Stewart replied:

> "THE COURT: I don't see that. All you are saying is it is futile because you assume you are going to lose. That doesn't make it futile."
>
> MR. TEITELBAUM: Not only because there is that assumption, your Honor."
>
> THE COURT: But that assumption is just an assumption. Suppose you don't lose. A lot of things we have to go through in our judicial process involves going through regulatory agencies where you can be pretty darn sure ... you are not going to win but it doesn't make it futile. It is part of the process of trying to find out who is right." (Transcript of Hearing, August 27, 1974, Tr. pp. 15-16) (D.26)

And a month later, commenting on Mr. Fuentes' second motion to enjoin the hearings, Judge Stewart again reminded plaintiff:

> "I don't see why I have to assume regardless of past history --- well, particularly in light of past history on other types of matters, that this board is going to deal

> improperly on what is basically a private contract matter." (Hearing, October 1, 1974, Tr. 20) (D.31)
>
> "Why shouldn't I wait and see what the hearing examiner and the board do before I hear the constitutional question? You say I should assume that the hearing examiner and the board are going to deal with this in an unconstitutional way. Why I should do so?" (Tr. 21).

Unfortunately, plaintiff throughout these proceedings appears to have sought to avoid and delay these hearings when they were available but to quickly demand their expedition when they appeared not to be available. He has sought injunctions of his suspension but, initially, merely decided on his own that his suspension was illegal. He has sought injunctions against his administrative hearings but even before the Court could rule on his request (and deny it) he effectively enjoined the hearings by simply refusing to appear because of "pending" litigation. He has sought the protection of some provisions of a generous and protective contract but claims that other provisions he has explicitly agreed to are unfair and unconstitutional.

In the meanwhile, the many rulings of the District Court, the State Supreme Court, the Appellate Division, the Chancellor, the City Board of Education and the State Commissioner of Education have all made it abundantly clear that plaintiff's suspension was lawful, and the administrative hearings which he has sought to avoid are lawful.

POINT I

THE PRELIMINARY INJUNCTION WAS PROPERLY DENIED SINCE THERE WAS NO SHOWING OF IRREPARABLE HARM.

Plaintiff sought to preliminarily enjoin both the administrative hearing procedure and his own suspension pending the determination of the charges against him. In discussing the criteria for determining whether a preliminary injunction should be granted, this Court has stated:

> "We have repeatedly emphasized the heavy burden on a party seeking the extraordinary remedy of preliminary injunctive relief."

Pride v. Community School Board of Brooklyn, 482 F.2d 257, 264 (2d Cir. 1973).

A. Irreparable Harm

Although several elements are necessary to obtain injunctive relief (see Pride, supra), the most important element, as the District Court correctly stated (Opinion, 12) is a showing of irreparable harm. The Supreme Court has clearly stated that for a preliminary injunction to be granted, irreparable harm to the plaintiff must be demonstrated. Sampson v. Murray, 415 U.S. 61, 88, 90 (1974). Additionally, regarding the nature of the

showing required, it has been held that:

> "Mere assertions of irreparable damage, absent prima facie supporting evidentiary facts, are insufficient to sustain the applicant's burden of proof."

Hudson Pulp and Paper Corp. v. Swanee Paper Corp., 223 F. Supp. 617, 618 (S.D.N.Y. 1963).

The District Court also recognized (Opinion, 12-13) that before granting a preliminary injunction in government personnel cases, the district court must find irreparable injury sufficient in kind and degree to override, among other things, "the traditional unwillingness of courts of equity to enforce contracts for personal service, either at the behest of the employer or of the employee...." Sampson v. Murray, 415 U.S. 61, 83 (1974).

Judge Stewart found that no such showing of irreparable harm was made in the instant case. He noted that,

> "Although Fuentes has been suspended, he has been receiving his salary and he has not been deprived of his right to practice as a school superintendent. He is free to seek similar employment either now or at the termination of his contract in July of 1975." (Opinion, 15)

The plaintiff had contended that his reputation and liberty were irreparably harmed by the charges which the defendant School Board had brought against him. The District Court disagreed,

holding that "it is the final outcome in this controversy that will either harm or vindicate his reputation." (Opinion, 14). The Court correctly stated that the claimed damage to reputation arising out of a suspension does not constitute irreparable injury for purposes of granting a preliminary injunction. Sampson v. Murray 415 U.S. 61, 91-92 (1974).

The District Court elaborated on this in its earlier opinion denying plaintiff's request for a temporary restraining order:

> "While these allegations raise difficult questions, the plaintiff has not shown that he, personally, will be irreparably harmed pending a fuller hearing for a preliminary injunction.
>
> Mr. Fuentes presently is charged with acts that affect his reputation, but there will be no increased damage to his reputation pending further hearings, and it is the final outcome in this controversy that will either harm or vindicate his reputation. The allegation that plaintiff's suspension will interfere with the smooth functioning of the school district has not been clearly shown to this court. Plaintiff has not demonstrated to this court that his ability to perform the duties as superintendent in the future has been or will be impaired by what might be just a temporary suspension. Plaintiff has been suspended with pay and a full due process hearing on the charges is scheduled. In addition, it is mere speculation without more evidence that there is or will be a chilling effect on the future exercise of plaintiff's First Amendment rights because of this alleged reprisal by the majority of the School Board of District One."

Memorandum decision, September 4, 1974, p.2

The plaintiff now argues that the district court's reliance on Sampson v. Murray, 415 U.S. 61 (1974), was misplaced because that case involved the dismissal of a probationary employee. Plaintiff contends that he possesses more comprehensive due process property rights than a probationary employee. Defendants submit, however, that the scope of plaintiff's due process property right is necessarily defined by his contract. And, his contract provides for the very hearing process which he seeks to enjoin. Additionally, any claim based upon a due process liberty right involving his reputation is premature since, as Judge Stewart found, it is the outcome of the hearing which will harm or vindicate his reputation. At this point, therefore, plaintiff has no greater due process rights than the plaintiff in Sampson v. Murray. (See the discussion of the relationship between plaintiff's contract and his due process rights, infra in Point V).

B. Consideration of the Effect of Injunctive Relief on the Administrative Process.

In considering the plaintiff's application for injunctive relief, the district court also was cognizant of the Supreme Court's mandate that,

> "The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of temporary relief . . . [is] likely to have on the administrative process."

Sampson v. Murray, 415 U.S. 61, 83 (1974). The reason for considering the effect on the administrative process is the same as the policy which the Supreme Court has said underlies the doctrine of exhaustion of administrative remedies:

> "A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based.... Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors."

McKart v. United States, 395 U.S. 185 (1969).

Plaintiff argues that he will be irreparably harmed if he is compelled to utilize what he characterizes as a unconstitutional and futile administrative process. But, as Judge Stewart found, the administrative process is neither unconstitutional nor futile, and to require plaintiff to go through with that process would not cause any irreparable harm. (The constitutionality of the administrative process is discussed infra in Point III).

C. Plaintiff's Claims are Premature.

Furthermore, Judge Stewart's finding that plaintiff will suffer no irreparable harm is supported by the fact that plaintiff's claims of damage to his reputation and infringement of his First Amendment rights are clearly premature. The mere bringing of charges against plaintiff, and his suspension with full pay pending the determination of the charges, are not acts which have the necessary impact on plaintiff to make a controversy that is ripe for judicial resolution. It is the final action taken on the charges--the determination of whether plaintiff is guilty of the charges, and if so, how he should be punished--which will have a concrete effect on plaintiff. Only at that point will plaintiff have a claim that is ripe for adjudication. This is not a question of exhaustion of remedies; it is a question of waiting until the very first step in the administrative process has been taken and has resulted in a determination that affects plaintiff in a substantial way. Prior to such a determination, plaintiff's claims are premature. For a fuller discussion of the prematurity issue see POINT II, infra.

D. Plaintiff was Properly Suspended Pending the Hearing.

Plaintiff, who is suspended with full pay pending a hearing on the charges, cannot claim that the suspension itself

constitutes an irreparable harm, or that it is in itself violative of constitutional due process.

Plaintiff clearly has been deprived of no property. He continues to receive his salary during the period of his suspension. In fact, the procedure employed here--suspension with pay pending a hearing on the question of termination--is exactly in accord with the suggestion of Justice White in Arnett v. Kennedy, 416 U.S. 134, 194 (1974) (White, J., concurring in part and dissenting in part).

Since plaintiff has been deprived of no property, he can only claim that his suspension harms him by depriving him of some "liberty" right. It is admitted that plaintiff has a "liberty" interest in his name, reputation, and integrity. But, in considering the protection of this interest, the Supreme Court clearly held in Arnett v. Kennedy, supra, that:

> "Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." 416 U.S. at 157.

The District Court properly recognized that if a post-dismissal hearing is held to be an adequate means of protecting a person's liberty interests, certainly the pre-termination hearing afforded plaintiff provides an even more adequate opportunity of protecting such interests.

POINT II

PLAINTIFF'S CHALLENGE TO THE SCHOOL BOARD'S ACTIONS IS PREMATURE

A. Prematurity in General

It is evident from numerous holdings of the courts that this case is not ripe for judicial determination and was properly dismissed by the District Court. The United States Supreme Court stated, in Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49(1967):

> "The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arose in the context of a controversy 'ripe' for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine, it is fair to say that its basic rationale is...to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (Emphasis added.)

In the present case, the Board has not formalized any decision; no decision on whether or not to terminate the plaintiff will be made until after a full hearing is held.

The plaintiff has not yet felt the effects of any Board decision in a concrete way. He has not been fired. He has not been deprived of his salary. He has merely been suspended from his duties with pay until the Board can make a final determination after a hearing.

Plaintiff's position is similar to that of plaintiffs in Reinecke v. Loper, 77 F. Supp. 333 (D. Hawaii 1948) (3-judge court), where teachers sought to enjoin the Commissioners of Public Instruction from trying them. The court in that instance held:

> "The plaintiffs were suspended [without pay] prior to the filing of the complaints but no final action has been taken by the Commissioners on the charges brought by the Superintendent of Public Instruction which would deprive them premanently of their teaching offices or tenures. While it is true that at the trials before the Commissioners the plaintiffs may be deprived of their offices and of their tenures, such, however, may not be the result. The plaintiffs in fact may be reinstated and made whole as to pay.... If the plaintiffs are illegally deprived of their offices and tenures by the Commissioners, they may then state causes of action which may not only be cognizable in this court under the Civil Rights Act but also of such a nature as to require a Federal court of equity to exercise its jurisdiction on their behalf.... We are of the view, however, that the suits at bar are at best premature, and in the exercise of what we deem ot be our sound legal discretion we will dismiss the actions." 77 F. Supp. at 335-36.

This language was quoted with approval in the similar case of Albert v. School District of Pittsburgh, 181 F. 2d 690, 692-93 (3d Cir. 1950).

B. Prematurity and Exhaustion of Remedies are Separate Grounds for Dismissal

The prematurity of plaintiff's claims is distinct from his failure to exhaust adequate state administrative remedies. We discuss below (Point IV) the requirement in this Circuit that adequate state administrative remedies must be exhausted in a civil rights action. However, even if exhaustion were not required, this action would still be premature since the hearing plaintiff seeks to enjoin is not the "administrative remedy" which he must exhaust as a way of correcting an adverse decision but is the very process which may lead to an adverse decision (i.e. dismissal) which may then be remedied.

Where a plaintiff seeks to avoid the only procedure which a state provides, the concept of exhaustion may be applied to the first hearing level since it is the only available procedure. Where however there are, as here, distinct appeal procedures beyond the initial decision-making level, and plaintiff seeks to avoid the first level hearing, his claim may be dismissed either for prematurity

and/or for failure to exhaust.

Thus, after noting the Supreme Court cases in which exhaustion was not required, the Fifth Circuit Court of Appeals stated:

> "We do not take these cases to hold, however, that federal courts are to intervene in school personnel and management problems without requiring such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication." Stevenson v. Board of Education, 426 F. 2d 1154, 1157 (5th Cir. 1970), cert.denied 400 U.S. 957 (1970).

C. Prematurity of First Amendment Claims

Plaintiff alleges that three of the forty-one charges brought against him are unconstitutional on their face as abridgements of First Amendment rights, and that the mere bringing of such charges entitles plaintiff to relief.

Defendants submit that the concepts governing prematurity and ripeness apply to plaintiff's claims concerning the alleged infringement by the charges of his First Amendment rights and that the District Court properly dismissed the action.

The mere raising of a First Amendment claim does not automatically make a case justiciable. The concept of prematurity and the requirement of ripeness have been equally applied where First Amendment claims have been raised. Thus, the Supreme Court in Arnett v. Kennedy ruled that plaintiff had to await his post-dismissed hearing even though he had raised a First Amendment claim (416 U.S. at).

All of the cases cited by plaintiff (Brief, pp. 51-56) in which First Amendment claims were raised and adjudicated involved challenges to final, concrete actions. Pickering v. Board of Education, 391 U.S. 563 (1968), involved a teacher who had been dismissed. Stolberg v. Board of Trustees for State College of Connecticut, 474 F. 2d 485 (2d Cir. 1973), involved a teacher whose contract was not

renewed and who was denied tenure. James v. Board of Education, 461 F. 2d 566 (2d Cir. 1972); involved a teacher who was dismissed. Johnson v. Branch, 364 F. 2d 177 (4th Cir. 1966); involved a teacher whose contract was not renewed. Rackley v. School District Number 5, 258 F. Supp. 397 (D.S.C. 1966), involved a teacher who was terminated. Williams v. Sumter School District Number 2, 255 F. Supp. 397 (D.S.C. 1966), involved a teacher whose contract was not renewed. And, McGee v. Richmond Unified School District, 306 F. Supp. 1052 (N.D. Cal. 1969), involved school community workers who were not rehired.

In every one of these cases, the government employee had been dismissed, terminated or had not been rehired. There was not merely the possibility of his happening, as here. Rather, the action against the employee was final and concrete and therefore ripe to be heard. The present situation is plainly distinguishable.

POINT III

THE DISTRICT COURT WAS NOT CLEARLY ERRONEOUS IN FINDING, AFTER HEARING THE TESTIMONY AND HAVING AN OPPORTUNITY TO JUDGE THE CREDIBILITY OF THE WITNESSES, THAT DEFENDANT SCHOOL BOARD MEMBERS WERE NOT ACTUALLY OR APPARENTLY BIASED AGAINST PLAINTIFF FUENTES AND THAT THE ADMINISTRATIVE HEARING PROCESS IS NOT VIOLATIVE OF DUE PROCESS

The plaintiff asserts that the administrative hearing process provided by the defendant Board is violative of constitutional due process because (1) defendants Roher and Price are allegedly biased and are alleged to have prejudged the issues, and (2) in any case, the multiplicity of roles played by the defendants in the hearing process is inconsistent with due process. After extensive testimony, Judge Stewart found that the defendant Board members were not biased against plaintiff and that the administrative hearing was not violative of due process. His findings were soundly based on the record and were not clearly erroneous.

A. The District Court Was Not Clearly Erroneous in Finding Defendants Roher and Price to be Not Biased

Judge Stewart conducted lengthy hearings (on October 25, 29, 30, November 4, 6, 7 and 12) and allowed

plaintiff an extensive opportunity to present his evidence. Defendants Adolph Roher and Richard Lee Price, as well as several other persons, testified at the hearing and were thoroughly examined by plaintiff's counsel and by Judge Stewart. Roher and Price were questioned regarding their views on the campaign literature attacking the plaintiff, and their views on the charges brought by the Board against plaintiff. They were also questioned about their views of the administrative hearing process and their roles therein. Both stated that they had knowledge of facts relating to some of the charges, and that they believed that some of the charges were true. But, both also testified that they would not draw any final conclusions on the charges until they had the opportunity to study the record developed by the hearing examiner, as well as the hearing examiner's recommendations.

Judge Stewart found, regarding Mr. Roher, that

> "On the basis of this record and our observation of Roher on the witness stand, we find his testimony credible, and we conclude that Roher is not actually biased against Fuentes. Moreover, we do not believe there is sufficient evidence of an appearance of bias to give rise to a violation of procedural due process. We believe Roher will fairly assess both the recommendations of the hearing examiner and the record of the administrative hearing before deciding how to vote on the charges against Fuentes." (Opinion, 29)

Similarly, regarding defendant Price's [18/] testimony, Judge Stewart found as follows:

> "On the basis of his testimony in court, we also find Price to be a credible witness. In particular, we believe that his letter to CEE requesting he be shown in advance its campaign literature endorsing him evinces an intent on his part ot proceed fairly during the election campaign. We believe this spirit of fairness will carry over to his deliberation of the charges against Fuentes, and that he, like Roher, will fully consider the record of the administrative hearing and the hearing examiner's recommendations before deciding how to vote on the charges against Fuentes. Consequently, we conclude that Price is not actually biased against Fuentes and that there is insufficient evidence of an appearance of bias to constitute a violation of Fuentes' rights to procedural due process." (Opinion below at p. 30)

Judge Stewart concluded that:

> "We find on the basis of the record before us that there is insufficient evidence to warrant the conclusion that the defendant majority members are actually or apparently biased against Fuentes. While they may believe that some of the charges against Fuentes are true, it is inconceivable that they could have brought any charges against him without believing that there was a reasonable chance that the charges were well-founded. Despite such initial beliefs, however, Roher and Price testified that they could and would examine both the record

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18/ Defendant Richard Lee Price, the vice chairman of the Board, is an attorney and the law secretary to a judge of the Civil Court, New York County. (Tr. 328).

> developed by [the hearing examiner] and his recommendations before determining how to vote in regard to the charges pending against Fuentes. Furthermore, as we have noted, we found both Roher and Price to be credible witnesses, and thus find believable their own assertions that they will be able to judge the charges against Fuentes fairly and impartially." (Opinion below at pp. 31-32).[19/]

Plaintiff challenges Judge Stewart's finding that the defendants are not biased, actually or apparently. In making such a challenge on appeal, the burden is clearly on the appellant to persuade the reviewing court that the finding was "clearly erroneous". Coalition for Education in District One v. Board of Elections, City of New York, 495 F. 2d 1090, _____ (2nd Cir. 1974), Watson v. Joshua Hendy Corp., 245 F. 2d 463 (2d Cir. 1957); Obolensky v. Saldana Schmier, 409 F. 2d 52 (1st Cir. 1969); Griffin v. Missouri Pacific R. Co., 414 F. 2d 696 (5th Cir. 1969); Arkansas Educ. Ass'n v. Board of Educ. of Portland, Ark., 456 F. 2d 763 (8th Cir. 1971); Purer & Co. v. Aktiebolaget Addo., 410 F. 2d 871 (9th Cir. 1969), cert. denied 396 U.S. 834.

19/ Judge Stewart also found the hearing examiner (Marcy Cowan), before whom the record would be developed, was neither actually or apparently biased and would be able to fairly conduct the hearing regarding the charges against Fuentes. (Opinion, 25). There is not the slighest basis for believing that any other hearing examiner, especially pursuant to the procedure ordered by Judge Stewart in his April 3, 1975 Order, would not be equally fair, and open-minded and permit the parties to develop a full record for review by the Board and by further reviewing bodies.

Appellees need not burden this Court with extensive discussions of the scope of appellate review. A brief recitation of the basic principles will suffice. The "clearly erroneous" standard is, of course, established by Rule 52(a), Fed. R. Civ. Proc., with the appellate court required to give "due regard...to the opportunity of the trial court to judge of the credibility of the witnesses." The latter provision if of particular applicability here since Judge Stewart had extensive opportunity to determine the credibility of the witnesses and determined unequivocally that he found defendant Board members to be credible witnesses.

The appellate court, in reviewing the findings, does not consider and weigh the evidence de novo. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100,123 (1969). The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 495-496 (1950); Zenith Radio Corp. v. Hazeltine Research, Inc., supra.

The appellate court must be especially reluctant to set aside a finding based on the trial judge's evaluation of oral testimony, and will do so only under the most unusual circumstances. Graver Tank & Mfg. Co. v. Linde

Air Products Co., 336 U.S. 271, 275 (1949); M.W. Zack Metal Co. v. S.S. Birmingham City, 311 F. 2d 334 (2d Cir. 1962), cert. denied 375 U.S. 816.

In light of the limited scope of review of the district court's findings of fact relating to the credibility and mental state of defendants Roher and Price on the issue of prejudgment of the charges, it is clear that plaintiff has not and cannot establish that Judge Stewart's findings were clearly erroneous. The fact that plaintiff disagrees with the findings is, of course, not enough to make the findings clearly erroneous. Plaintiff has failed to show that the findings are without adequate evidentiary support in the record.

B. The Various Duties and Roles Performed By the Defendants In the Administrative Process Does Not Violate Due Process

The plaintiff concedes that Judge Stewart:

> "... correctly held that 'a presumption of bias or an appearance of bias is sufficient to show a violation of due process.'" (Plaintiff's Brief on Appeal, p. 32)

However, plaintiff contends that the district court misapplied that standard to the facts. Plaintiff's argument in this regard is basically that, since defendants Roher and Price have knowledge of some of the facts concerning the charges, since they and the other members of the Board brought the charges, and since they will ultimately determine whether the charges are sustained, they must be presumed to be biased and cannot be considered an impartial decision-making body.

It should be noted initially that, regardless of what one might have presumed about the defendants based solely on the multiple nature of their roles, that presumption could be overcome by the fact that defendants Roher and Price appeared in court and were examined by plaintiff's counsel and the Court concerning their views of the charges and of the administrative process. And, based on that testimony, the District Court found that they were not biased and would consider the record to be produced before a neutral hearing examiner fairly and completely.

The argument that an administrative body's dual functions as initiator of charges and as judge of those charges

necessarily creates a showing of impermissible bias and prejudgment has been raised and refuted in many cases.

In a case involving a hearing before the Federal Home Loan Bank Board, the Supreme Court said:

> "Objection is made to the administrative hearing upon the ground that it is before the same authority which has preferred the charges and that it cannot be expected, therefore, to be fair and impartial .... We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted." Fahey v. Mallonee, 332 U.S. 245, 256 (1947).

Similarly, in Pangburn v. Civil Aeronautics Board, 311 F. 2d 349 (1st Cir. 1962), the Court stated:

> "It is well settled that a combination of investigative and judicial functions within an agency does not violate due process." 311 F. 2d at 336.

The Court went on to hold that:

> "[W]e cannot say that the mere fact that a tribunal has had contact with a particular factual complex ... or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing." 311 F. 2d at 358.

The courts will not assume in advance that the fact finder will not act fairly. This is evidenced by the Court's explanation in National Lawyer's Guild v. Brownell, 225 F. 2d 552 (D.C. Cir. 1955), cert. denied 351 U.S. 927 (1956):

> "It is to be noted that in [Marcello v. Bonds, 349 U.S. 302 (1955), Shaughnessy v. U.S. ex rel. Arcardi, 349 U.S. 280 (1955), and Federal Trade Comm'n v. Cement Institute, 333 U.S. 683 (1948)] the Supreme Court treated the developments at the administrative hearings as determinative of the issue of claimed prejudgment. Implicit in that treatment is the thought that decision upon alleged prejudgment must await the presentment of proof of effect." 225 F. 2d at 555. (Emphasis added.)

The Court concluded,

> "[W]e cannot now speculate as to the nature of the proceeding which may occur, or now hold invalid any and all proceedings on account of the possibilities." 225 F. 2d at 557.

More recently, in the case of Richardson v. Perales, 402 U.S. 389 (1971), a case involving a hearing on a claim under the Social Security Act, the claimant asserted that the hearing procedure violated due process because, as he put it:

> "[T]he hearing examiner has the responsibility for gathering the evidence and 'to make the Government's case as strong as possible'; that naturally he leans toward a decision in favor of the evidence he has gathered...." 402 U.S. at 408-09.

In rejecting this claim, the Supreme Court stated:

> "Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a government structure of great and growing complexity." 402 U.S. at 410.

In the present situation, were the Court to accept plaintiff's arguments, it would mean in effect that a community school board could never dismiss its superintendent. Charges against a superintendent would in almost all cases, and of necessity, come from members of the school board since it is to them that he is responsible and it is they who would be most aware of his misconduct in not implementing their policies. To argue that the imitation of such charges by a school board should disqualify the school board from ruling on the removal

of their superintendent is to distort and frustrate the legislative intent and educational process. Moreover, such an argument provides a convenient bootstrap device for misbehaving employees who wish to disqualify their employers from sitting in judgment on their behavior.

These problems were recognized in Beattie v. Roberts, 436 F. 2d 747 (1st Cir. 1971). In that case, the Superintending School Committee both made the initial determination not to renew the plaintiff's contract, and sat as the decision maker at the hearing granted the plaintiff. The plaintiff argued that due process required a completely neutral decision maker at the hearing, and that the Committee, having already made an initial decision not to renew his contract, was not impartial. The court said:

> "If we required the state or municipalities to create neutral bodies to which the Committee's decision to dismiss could be appealed, we would be engrafting into educational administration an appellate layer of enormous complexity, and might well exceed the boundaries of our judicial authority and trespass into legislative territory." 436 F. 2d at 75.

Similarly, see Simard v. Board of Education of Town of Groton, 473 F. 2d 988, 993 (2d Cir. 1973).

Numerous New York state court decisions are in accord with the federal cases cited above concerning multiplicity of functions. The case of Sharkey v. Thurston, 268 N.Y. 123 (1935), is relevant to the present case. In that case, the right to a hearing was derived from a statute, whereas in the present case, the plaintiff's right to a hearing is derived

from his contract. However, the Court's opinion is otherwise squarely in point. The New York Court of Appeals stated:

> "... when the statute clearly requires the hearing to be held before a designated administrative officer, and on other officer can hold the hearing, then the language of the statute may not be disregarded, nor the legislative intent defeated by holding that the officer is disqualified.
>
> x x x
>
> If he [the officer involved] properly performs his duty of supervision of the administration of the affairs of the city, then he must be in a position to determine whether that administration is efficient, and his power of removal, even though limited, is the instrument by which he can remove those officers who, in his opinion, are lax in the performance of their duties. Quite evidently he is not to close his eyes to evidence of inefficiency or misconduct disclosed to him in performance of his duty of supervision. His power of removal is not to be confined to matters upon which he has no personal knowledge, or after charges not made or instigated by him. ... He may make charges based upon his own knowledge and remove an officer if, after a hearing, he believes those charges are sustained. ...Even then the hearing is not futile. It requires formulation of the charge, and a public record of the defense presented." 268 N.Y. at 128-129.

Accord, Matter of Kaney v. New York State Civil Service Commission, 190 Misc. 944, 947-948 (Sup. Ct., Erie Co. 1948), aff'd 273 App. Div. 1054, aff'd 298 N.Y. 707; Matter of Reed v. Richardson, 26 Misc. 2d 89, 92-94 (Sup. Ct., Onondaga Co. 1960); Matter of Widger v. Board of Educ. of Central School Dist. 1, 35 Misc. 2d 529 (Sup. Ct., Cattaraugus Co. 1962);

Matter of Yorke v. Board of Educ. of Union Free School Dist. 20 61 Misc. 2d 794, 797 (Sup. Ct., Nassau Co. 1969); Komyathy v. Board of Educ. of Wappinger Central School Dist. 1, 75 Misc. 2d 859, 864-866 (Sup. Ct., Dutchess Co. 1973).

In a case in which a school board preferred charges against a teacher, conducted a hearing on the charges, and dismissed the teacher (but failed to make the required findings of fact), the court discussed the only limitation on the board's use of its own knowledge of the charges:

> "This is not to say that such personal knowledge may not constitute relevant and material evidence, because it may (Sharkey v. Thurston, 268 N.Y. 123). But such evidence must be made known to the petitioner and be made the subject of cross-examination so that the defense thereto may be presented and a proper record made." Matter of Yorke v. Board of Educ. of Union Free School Dist. 20, 61 Misc. 2d 794, 797 (Sup. Ct., Nassau Co. 1969)(Meyer, J.).

The procedure described by the court in Matter of Yorke, supra, is exactly the procedure which would be followed in the present case.

In Komyathy v. Board of Educ. of Wappinger Central School Dist. 1, 75 Misc. 2d 859 (Sup. Ct., Dutchess Co. 1973) (Gagliardi, J.), a case involving a school board which brought charges against one of its own members and which would ultimately determine the charges, the court quoted with approval the language of Sharkey v. Thurston, supra, and cited other cases upholding the validity of investigatory, prosecutory, and quasi-judicial functions in a single administrative body. The court also indicated that if the board's procedure contained

the safeguard of an impartial hearing panel which would be less open to a subsequent charge of bias. 75 Misc. 2d at 870. Just such a safeguard is present in the instant case. The charges against the plaintiff will be heard by an impartial hearing examiner, who will report to the Board on his findings of fact and recommendations.

The recent case of Matter of Appeal of Abramowitz, 14 Ed. Dept. Rep. ____ (Decision No. 8990, April 7, 1975),[19/] before the New York State Commission of Education is particularly illustrative of the principles involved here. Matter of Abramowitz involved a board of education (on Great Neck, Long Island), which brought charges against its superintendent of schools, conducted a hearing on the charges, sustained the charges, and voted to terminate the superintendent. As in the present case, the superintendent's right to a hearing and the procedures incident thereto were derived from his contract with the board. Upon his termination, the superintendent appealed to the State Commissioner of Education; (such an appeal will also be available to the plaintiff in the present case, as discussed below) although the Commissioner reversed the board's findings and decision and ordered the superintendent reinstated, he rejected the argvorent that the multiplicity of functions was a per se violation of the right to a fair and impartial hearing. The Commissioner of Education stated:

> "Pursuant to the above-quoted contractual provision, only the board of education could hear charges seeking removal of its chief school officer. If it were precluded from exercising this authority

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19/ Included for the Court's convenience as Appendix, "O"

> solely by virtue of an alleged bias or predisposition, its employees would be insulated to a degree which might frustrate the ends of justice." (Commissioner of Education's opinion at 4.)

The Commissioner of Education went on to state that in reviewing the determination of a board whose members gave testimony on the charges under consideration by that board, he would be careful to look out for any impermissible bias:

> "...[T]he weight to be given such testimony and the findings of fact based thereon will be strongly influenced by the multiplicity of functions which the board performed and by the evidence of the existence of such prejudice or bias ...." (Commissioner of Education's opinion at 5.)

POINT IV

THE ACTION WAS PROPERLY DISMISSED BECAUSE PLAINTIFF HAS FAILED TO EXHAUST AN ADEQUATE ADMINISTRATIVE REMEDY

The District Court properly denied plaintiff's motions and dismissed his complaint, inter alia, for failure to exhaust adequate state administrative remedies. (Opinion, 16-19). A clear line of decisions in this Circuit has carefully developed and explained, consistent with decisions of the Supreme Court, that requirement that plaintiffs in actions brought under 42 U.S.C. §1983 must first exhaust adequate state administrative remedies. Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970), James v. Board of Education, 461 F. 2d 566 (2d Cir.), cert. denied, 409 U.S. 1042 (1972), Blanton v. State University, 489 F. 2d 377 (2d Cir. 1973), Plano v. Baker, 504 F. 2d 595 (2d Cir. 1974). We believe Judge Stewart succinctly summarized the recent history and we will not add to it here.[20/]

20/ Defendants presented a more extended discussion of this issue in a brief submitted to the District Court (D. 30, pages 11-21).

What should be emphasized is that an appeal to the State Commissioner of Education (purusant to N.Y. Educ. Law §310 or §2590-j.7(f)), from a decision of the school board, or of the New York City Board of Education, would be a thorough and adequate review because of the full record developed at the evidentiary hearing before the trial examiner. Regardless of the school board's decision, the Commissioner of Education would review the record below (something which could not be done in Plano, supra, because there had been no hearing record established below which the Commissioner could review.

The Commissioner and his legal staff regularly review and frequently reverse or modify decisions after a thorough review of the record established at disciplinary hearings. For example see Matter of Brink 7 Ed. Dept. Rep. 9 (1967), Matter of Walsh 9 Ed. Dept. Rep. 136 (1970), Matter of Westerling 11 Ed. Dept. Rep. 251 (1972), Matter of Community School Board No. 9 12 Ed. Dept. Rep. 94 (1972), Matter of Cunningham 12 Ed. Dept. Rep. 207. Of special relevance is Matter of Abramowitz (Appendix, "O") decided recently on very similar facts and involving a reversal by the Commissioner of the dismissal of a superintendent by a school board.

POINT V

THE PLAINTIFF'S CONTRACT DEFINES THE SCOPE OF HIS DUE PROCESS PROPERTY RIGHTS.

In order to claim the protection due process safeguards, an individual must show that he is being deprived of liberty or property. Board of Regents v. Roth, 408 U.S. 564 (1971). And, the Supreme Court has noted that:

> "Property interests, of course, are not created by the Constitution. Rather, they are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577.

In light of this, it is necessary to look at what "rules or understandings" define the plaintiff's "property interest" in his job.

Under the New York Education Law, a community superintendent is hired by contract and is "subject to removal for cause." (Education Law §2590-e.1.a). No hearing is required. This is to be distinguished from the procedure provided regarding tenured teachers and supervisors, who cannot be removed except for cause and only after a hearing. (See Education Law §2573(6) and (7) regarding provisions for high school personnel and others under the Chancellor's jurisdiction, and §2590-j(7) regarding provisions for personnel under the jurisdiction of the community school boards).

As with the community superintendent, the Legislature provided that the Chancellor of the city school system is

also "removable for cause" without the requirement of a hearing. (Education Law §2590-h). The same was true of the Superintendent of Schools and the Associate Superintendents prior to decentralization of the city school system in 1970. (Education Law §2565(1).

This clear statutory scheme, which provides that the highest educational officials (as distinguished from lower ranking tenured teachers and supervisors) can be removed merely by providing "cause" but without requiring a hearing, evinces a legislative recognition of the unique relationship between a school board and its superintendent and his basic obligation to implement the policies and directives of the school board.

Thus, the state law that would be applicable to the plaintiff, were it not for his contract, states that he is removable for cause, without a hearing. The state statutory scheme makes it clear that plaintiff, as a community superintendent, was purposely put in a classification different from that of tenured teachers and supervisors, who were granted specific hearing rights by the state. State statutory provisions set the limits on the plaintiff's entitlement to continued employment, in the absence of his contract (and, indeed, it is at least arguable that state law sets the limits on plaintiff's rights notwithstanding his contract - an issue which need not here be decided). Plaintiff's expectation of continued employment, and thus

his rights, if any, to due process protection, would stem from and are limited by the state statutory provisions. And because these provisions provide for removal without hearings (while identical provisions for other employees specifically require hearings) it is clear that plaintiff would not have a right to a due process hearing upon removal, at least not one based on a "property" interest hearing.

The extensive procedural safeguards which plaintiff does possess thus come from, and are limited by, the contract which he negotiated. He cannot now come and challenge the very provisions which he has sought, as he has done so vigorously in this proceeding. What the courts have sometimes said about the allowance of challenges to statutes should also be applicable to the allowance of challenges by plaintiff to the procedural safeguards granted him in his contract.

The Supreme Court has said:

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.'" Fahey v. Mallonee, 332 U.S. 245, 255 (1947).

More recently, after quoting the above passage, the Supreme Court restated this rule in the following way:

> "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant ... must take the bitter with the sweet." Arnett v. Kennedy, 416 U.S. 134, 153-154 (1974).

This quotation from Arnett is surely applicable to the present case. The plaintiff would like to take advantage

of the "sweet" benefit of having a right to a full evidentiary hearing, but he objects to the "bitter" limitation which provides that the decision on the charges, after the hearing, is to be made by the School Board.

Plaintiff bargained for the rights given him by the terms of his contract. The District Court found that the School Board had complied with its responsibilities under the contract. (Opinion, 12) Assuming the validity of the contract, plaintiff should be bound to its terms by the doctrine of estoppel by contract. As one Court has noted:

> "... a party is bound by the terms of his own contract until set aside ... based on the idea that a party to a contract will not be permitted to take a position inconsistent with its provisions, to the prejudice of another." Woodward v. General Motors Corp., 298 F 2d 121, 129 (5th Cir. 1962), cert. denied 369 U.S. 887 (1962).

For this reason, plaintiff should be estopped from objecting to the procedures which have been afforded him and which are exactly those provided for in the contract.

Plaintiff alleges that the school board's charges against him have impugned his name, reputation, and integrity. It is admitted that every individual has a "liberty" interest should not be infringed upon without due process of law. With respect to interest, it has been said that liberty is offended

> "by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee." Arnett v. Kennedy, 416 U.S. 134, 157 (1974) (Rehnquist, J.).

However, as was there pointed out:

> "Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." Id. (Emphasis added)

It appears from Arnett v. Kennedy that five members of the Supreme Court (Rehnquist, Stewart, Powell, Blackman, J.J., and Berger, C.J.) agree with the above holding. Thus, Judge Stewart correctly concluded that if a government employee's procedural due process rights could be adequately protected by an administrative hearing of the employee's dismissal, "[a] fortiori, then, any rights which Fuentes may have to procedural due process will be adequately protected by an administrative hearing following the lesser action of a suspension with pay." (Opinion, 34-35).

CONCLUSION

FOR THE REASONS DISCUSSED HEREIN, THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

Dated: New York, New York
May 1, 1975

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I, DORON GOPSTEIN, hereby certify that on May 1, 1975, copies of the attached Defendants'Appellees' Brief and Appendix were served by mail as follows:

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